



NO JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11	REAL PARTY(S) IN	)	Case No. CV 09-08810 DDP (CTx)
12	INTEREST(S): PATRICIA	)	
12	ULTRERAS,	)	<b>ORDER GRANTING DEFENDANTS' MOTION</b>
13		)	<b>TO DISMISS</b>
13	Plaintiff,	)	[Motion filed on January 19,
14		)	2010]
14	v.	)	
15	RECON TRUST COMPANY; AND/OR	)	
16	MERS; AND/OR COUNTRYWIDE	)	
16	HOME LOANS, INC.; AND/OR	)	
17	BANK OF AMERICA,N.A.; AND/OR	)	
17	ANY KNOWN OR UNKNOWN JOHN	)	
18	DOES, AND/OR REAL PARTY(S)	)	
18	IN INTEREST,	)	
19		)	
19	Defendants.	)	
20	_____	)	

This matter comes before the Court on a Motion to Dismiss filed by the defendants ReconTrust Company, N.A. (erroneously sued as "Recon Trust Company"); Mortgage Electronic Registration Systems, Inc. ("MERS"); Countrywide Home Loans, Inc.; and Bank of America, N.A. (collectively "Defendants"). After reviewing the papers submitted by the parties and considering the arguments raised therein, the Court GRANTS the motion and adopts the following Order.

1 **I. BACKGROUND<sup>1</sup>**

2 The plaintiff Patricia Ultreras ("Plaintiff"), appearing pro  
 3 se, filed this suit alleging various causes of action arising from  
 4 a residential mortgage transaction. The gravamen of Plaintiff's  
 5 Complaint is that Defendants cannot foreclose for three basic  
 6 reasons: (1) they did not provide certain disclosures when  
 7 providing her loan; (2) they did not produce the original note; and  
 8 (3) they securitized the debt.

9 On September 25, 2006, Plaintiff purchased property at 138  
 10 South Bryn Mawr Street, #13, in Ventura, California, by executing a  
 11 Deed of Trust for \$271,920.00. (Def.'s Ex. A.) On the Deed of  
 12 Trust, Countrywide was listed as the lender, ReconTrust as the  
 13 trustee, and MERS as the beneficiary. (Compl. ¶¶ 26-27; Def.'s Ex.  
 14 A.)

15 A Notice of Default was recorded against Plaintiff's property  
 16 on February 20, 2009. (Def.'s Ex. B.) A Notice of Trustee's Sale  
 17 was recorded on May 27, 2009, setting the sale date for June 12,  
 18 2009. (Def.'s Ex. C.) Plaintiff alleges that she "rescinded said  
 19 contract" on June 17, 2009, by mailing a "Notice of Right to  
 20 \_\_\_\_\_

21 <sup>1</sup>Defendants request that the Court take judicial notice of the  
 22 Deed of Trust, (Def.'s Ex. A), the Notice of Default, (Def.'s Ex.  
 B), and the Notice of Trustee's Sale, (Def.'s Ex. C).

23 Although, generally, the Court may not consider materials  
 24 outside of the complaint when ruling on a motion to dismiss, it may  
 do so if the complaint references the materials and their  
 authenticity is not disputed. See Branch v. Tunnell, 14 F.3d 449,  
 454 (9th Cir. 1994), overruled on other grounds by Galbraith v.  
 25 County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) (on a motion  
 to dismiss, courts may properly review "documents whose contents  
 26 are alleged in the complaint and whose authenticity no party  
 questions, but which are not physically attached to the plaintiff's  
 27 pleading").

28 The Court grants Defendants' request for judicial notice  
 pursuant to Branch, 14 F.3d at 454.

1 Cancel," a "Notice of Removal," and a "Notice of Revocation of  
2 Power of Attorney" to Defendants. (Compl. ¶ 31.)

3 Plaintiff asserts six causes of action against Defendants,  
4 respectively entitled (1) injunctive relief; (2) Unfair Debt  
5 Collection Practices & Predatory Lending Including TILA and RESPA  
6 Violations; (3) Failure to Be the Real Party in Interest in a  
7 Foreclosure Action; (4) Failure to be the Holder in Due Course of  
8 the Original Note and Mortgage in a Foreclosure Action; (5) Illegal  
9 Securitization of the Note; and (6) Ultra Vires.

10 Defendants moved to dismiss the Complaint on January 19, 2010.  
11 Plaintiff filed an opposition one day past the deadline, on  
12 February 9, 2010. In the interests of resolving Defendant's motion  
13 on the merits, the Court will nonetheless consider Plaintiff's  
14 opposition.

15 **II. PROCEDURAL STANDARD: RULE 12(b)(6)**

16 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a  
17 complaint is subject to dismissal when the Plaintiff's allegations  
18 fail to state a claim upon which relief can be granted. When  
19 considering a 12(b)(6) motion to dismiss for failure to state a  
20 claim, "all allegations of material fact are accepted as true and  
21 should be construed in the light most favorable to [the]  
22 plaintiff." Resnick v. Hayes, 213 F.3d 433, 447 (9th Cir. 2000).

23 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the  
24 Supreme Court explained that a court considering a 12(b)(6) motion  
25 should first "identify[] pleadings that, because they are no more  
26 than conclusions, are not entitled to the assumption of truth."  
27 Id. Next, the court should identify the complaint's "well-pleaded  
28 factual allegations, . . . assume their veracity and then determine

1 whether they plausibly give rise to an entitlement to relief."  
2 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th  
3 Cir. 2009) ("In sum, for a complaint to survive a motion to  
4 dismiss, the non-conclusory factual content, and reasonable  
5 inferences from that content, must be plausibly suggestive of a  
6 claim entitling the plaintiff to relief" (internal quotation marks  
7 omitted)).

8 Where, as here, a plaintiff brings her action pro se, the  
9 Court applies the motion to dismiss standard against the backdrop  
10 of the general rule that courts liberally construe the pleadings of  
11 pro se litigants. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

### 12 **III. DISCUSSION**

#### 13 **A. First Claim for Injunctive Relief Fails**

14 Plaintiff's first claim for injunctive relief is premised on  
15 her assertion that non-judicial foreclosure "is illegal and  
16 violates both state and federal law." (Compl. ¶ 2.)

17 Contrary to Plaintiff's argument, California law expressly  
18 permits non-judicial foreclosure. See Cal. Civ. Code §§ 2924 et  
19 seq. Indeed, the foreclosure process may be conducted by the  
20 "trustee, mortgagee or beneficiary or any of their authorized  
21 agents." Id. § 2924(a)(1). The beneficiary under a Deed of Trust,  
22 or its authorized agent is entitled to record the Notice of Default  
23 in order to initiate non-judicial foreclosure proceedings. Id.  
24 The trustee has the authority to "initiate nonjudicial foreclosure  
25 on the property upon the trustor's default, resulting in a sale of  
26 the property." Kachlon v. Markowitz, 168 Cal. App. 4th 316, 334  
27 (2008). Plaintiff has pointed to no authority suggesting that this  
28

1 type of non-judicial foreclosure, permissible under California law,  
2 is nonetheless barred by federal law.

3 Therefore, Plaintiff's claim for injunctive relief on the  
4 basis that non-judicial foreclosure is illegal fails as a matter of  
5 law and is dismissed with prejudice.

6 **B. Second Claim for Unfair Debt Collection Practices, TILA,**  
7 **and RESPA Violations Fails**

8 Plaintiff's second cause of action asserts that Defendants  
9 violated California's Rosenthal Fair Debt Collection Practices Act  
10 ("RFDCPA"), the Federal Fair Debt Collection Practices Act  
11 ("FDCPA"), the Real Estate Settlement Procedures Act ("RESPA"), and  
12 the Truth in Lending Act ("TILA"). (Compl. ¶¶ 7-18.)

13 1. The RFDCPA and FDCPA Do Not Apply to Foreclosures

14 The FDCPA and the RFDCPA were enacted in order to prohibit  
15 debt collectors from engaging in unfair or deceptive acts or  
16 practices in the collection of consumer debts. 15 U.S.C. § 1692 et  
17 seq.; Cal. Civ. Code § 1788.1(b).

18 However, foreclosing on a property under a deed of trust is  
19 not the collection of a debt within the meaning of either statute.  
20 See Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1199 (C.D.  
21 Cal. 2008); see also Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d  
22 1188, 1204 (D. Or. 2002).

23 Therefore, these claims are dismissed with prejudice.

24 2. Plaintiff's RESPA Allegations Fail to State a Claim

25 Plaintiff badly asserts that Defendants violated RESPA, 12  
26 U.S.C. §§ 2601-17, by "plac[ing] loans for the purpose of  
27 unlawfully increasing and otherwise obtaining yield spread fees,  
28

1 excess charges and amounts in excess of what would have been  
2 lawfully earned." (Compl. ¶ 15.)

3 Yield spread premiums are not per se illegal under RESPA.  
4 See, e.g., Bjustam v. Trust One Mort. Corp., 322 F.3d 1201, 1208  
5 (9th Cir. 2003). Rather, RESPA "requires a loan-specific analysis  
6 of whether total mortgage broker compensation from all sources is  
7 reasonable." Id. However, Plaintiff has failed to plead any facts  
8 demonstrating why the yield spread premiums in this case were  
9 allegedly illegal.

10 Plaintiff also claims Defendants violated RESPA because they  
11 "transferred or hypothecated without required notice" servicing of  
12 the loan. (Compl. ¶ 16.) However, Plaintiff waived prior notice  
13 of any loan assignment. (Def.'s Ex. A, ¶ 20.) Furthermore,  
14 Plaintiff pleads no facts in support of her argument that  
15 Defendant's actions in transferring the servicing of her loan  
16 violated RESPA.

17 Plaintiff has therefore failed to state a claim for RESPA  
18 violations.

19 3. Plaintiff's TILA Claim Fails

20 Plaintiff asserts that Defendants violated TILA by (1) failing  
21 to make a full accounting and required disclosures; (2) improperly  
22 retaining funds belonging to Plaintiff; and (3) not disclosing the  
23 status of the ownership of the loan. (Compl. ¶ 13.) In addition  
24 to damages, Plaintiff seeks rescission under TILA because she has  
25 "exercised his [sic] Rights of Rescission" in 2009. (Id. ¶ 14.)  
26 However, Plaintiff's damages and rescission claims under TILA are  
27 both time-barred.

28 ///

1        TILA provides that an "action [for damages] . . . may be  
2 brought in any United States district court, or in any other court  
3 of competent jurisdiction, within one year from the date of the  
4 occurrence of the violation." 15 U.S.C. § 1640(e). The Ninth  
5 Circuit has held that the one-year window for filing a TILA damages  
6 claim generally "runs from the date of the consummation of the  
7 transaction." King v. California, 784 F.2d 910, 915 (9th Cir.  
8 1986). Here, the Court can discern from the face of Plaintiff's  
9 Complaint that TILA's one-year statute of limitations has run.  
10 Plaintiff obtained the mortgage loan at issue in September 2006,  
11 but did not file suit until December 2009. Plaintiff has pleaded  
12 no basis for equitable tolling or equitable estoppel that would  
13 justify suspending the limitations period.

14        With respect to Plaintiff's rescission claim under TILA, TILA  
15 requires that loan documents state the last date on which a  
16 borrower may rescind the loan agreement without penalty. See 15  
17 U.S.C. § 1635(a). If the lender omits the expiration date, and  
18 fails to cure that omission, the time within which the borrower may  
19 rescind the loan is extended from three days to three years. See  
20 id. § 1635(f). Plaintiff has made vague allegations that  
21 Defendants failed to make "required disclosures," but has not  
22 alleged that Defendants failed to notify her of the last date  
23 within which she could rescind the loan without penalty. Thus, it  
24 appears her rescission claim is time-barred.

25        Even assuming that Plaintiff was entitled to rescind within  
26 three years of the date the loan was consummated, her claim still  
27 fails because she has not alleged her ability to tender. The TILA  
28 section titled "Return of money or property following rescission"

1 provides that "[u]pon the performance of the creditor's obligations  
2 under this section, the obligor shall tender the property to the  
3 creditor, except that if return of the property in kind would be  
4 impracticable or inequitable, the obligor shall tender its  
5 reasonable value." 15 U.S.C. § 1635(b). "By far, the majority of  
6 Courts to address the issue recently have required that borrowers  
7 allege an ability to tender the principal balance of the subject  
8 loan in order to state a claim for rescission under TILA." Garcia  
9 v. Wachovia Mortgage Corp., 2009 WL 3837621 at \*3 (C.D. Cal.  
10 October 14, 2009) (collecting recent decisions from district courts  
11 within the Ninth Circuit).

12 The Court agrees with the "developing majority position" as  
13 articulated in Garcia. Id. at \*4. Accordingly, Plaintiff must  
14 allege ability to tender in order to state a claim for TILA  
15 rescission. Because she has not done so, the Court grants  
16 Defendants' motion with respect to Plaintiff's rescission claim.

17 **C. Third Claim Under Fed. R. Civ. P. 17(a)(1) Fails**

18 Plaintiff's third cause of action states that it is for  
19 "Failure to Be the Real Party in Interest in a Foreclosure Action"  
20 under Federal Rule of Civil Procedure 17(a)(1). This claim is not  
21 cognizable. California law permits non-judicial foreclosures, and  
22 the Federal Rules of Civil Procedure are merely procedural and do  
23 not set forth any substantive rights with respect to foreclosures.  
24 This claim is therefore dismissed with prejudice.

25 **D. Fourth Claim Regarding "Original Note" Fails**

26 Plaintiff's fourth cause of action alleges that Defendants  
27 must provide evidence "of an original note, original mortgage and .  
28 . . show that they are indeed the holder [sic] in due course," and



1 that their failure to do so means "they are not authorized by law  
2 to proceed in a foreclosure action." (Compl. ¶ 20.) However,  
3 under California law, production of the original note is not  
4 required to initiate a non-judicial foreclosure. See Cal. Civ.  
5 Code § 2924(a); see also Farmer v. Countrywide Home Loans, Inc.,  
6 2008 WL 189025, at \*2 (S.D. Cal. Jan. 29, 2009) (holding there is  
7 "no requirement under California law that the original note be  
8 produced in order to render the foreclosure proceedings valid").  
9 Therefore, Plaintiff's fourth claim is dismissed with prejudice.

10 **E. Fifth Claim for "Illegal Securitization" Fails**

11 Plaintiff asserts that "securitization is illegal," and that  
12 it violates "RICO, usury, and antitrust laws." (Compl. ¶ 21.)  
13 These "'conclusory allegations of law and unwarranted inferences'"  
14 do not support a claim for relief. Vazquez v. Los Angeles County,  
15 487 F.3d 1246, 1249 (9th Cir. 2007) (quoting Schmier v. U.S. Ct. Of  
16 Appeals for the Ninth Cir., 279 F.3d 817, 820 (9th Cir. 2002)).  
17 The Court therefore dismisses this claim with prejudice.

18 **F. Sixth Claim for "Ultra Vires" and Fraud Fails**

19 Plaintiff alleges that a contract beyond a corporate charter  
20 is void. (Compl. ¶ 22.) She baldly asserts that Defendants  
21 engaged in fraud. (Id. ¶ 25.) First, it is unclear how the  
22 corporate "ultra vires" doctrine has any relevance to this case.  
23 Second, to the extent this claim can be read as one for fraud, that  
24 claim is time-barred. Cal. Code Civ. Proc. § 338(d) (setting forth  
25 three-year statute of limitations for fraud actions). The Court  
26 therefore dismisses this claim with prejudice.

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28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Defendants'  
3 motion. All of Plaintiff's claims are dismissed with prejudice,  
4 with the exception of her TILA and RESPA claims, which are  
5 dismissed with leave to amend.

6 Plaintiff may amend her Complaint to attempt to cure the  
7 deficiencies in her TILA and RESPA claims, namely (1) she may  
8 attempt to plead facts demonstrating a basis for equitable tolling  
9 or equitable estoppel for her TILA damages claim; (2) she may  
10 attempt to plead facts showing ability to tender with respect to  
11 her TILA rescission claim; (3) she may attempt to plead specific  
12 facts demonstrating how Defendants allegedly have violated RESPA.  
13 Plaintiff's amended complaint must be filed within twenty one (21)  
14 days of the date of this Order. Failure to file an amended  
15 complaint before this deadline shall be deemed consent to dismissal  
16 with prejudice.

17 IT IS SO ORDERED.

18  
19  
20 Dated: June 7, 2010

  
DEAN D. PREGERSON  
United States District Judge